92-1836

NO.

Supreme Court, U.S.
FILED
MAY 12 1993
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES M. PREE,

Petitioner,

vs.

THE BRUNSWICK CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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48 pp

QUESTIONS PRESENTED FOR REVIEW

Under *Erie* and the Tenth Amendment, Was the Eighth Circuit Obligated to Follow *Dicta* In a Missouri Supreme Court Decision Rejecting the "Consumer Expectation" Test for Strict Products Liability?

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OPINION BELOW

The opinion below is reported as Pree v. Brunswick Corp., 983 F.2d 863 (8th Cir. 1993).

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment against Petitioner on January 7, 1993, and denied Petitioner's Petition for Rehearing on February 12, 1993.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Amendment X to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

James M. Pree was severely and permanently injured when his foot was struck by a propeller, which was part of an out-drive manufactured by appellee/respondent. He brought a single count product liability action in the state courts of Missouri, under strict liability in tort for enhancement of injury, on the basis that defendant's lower unit was defectively designed due to the absence of a propeller guard. Defendant Brunswick removed the case to federal court on the basis of diversity of citizenship. After defendant was permitted, over objection, to introduce testimony concerning drinking by appellant/petitioner during the 36 hour period before his leg was struck by the propeller, and to argue that such drinking was the "sole cause" of the petitioner's injury, the jury returned a defendant's verdict.

The Eighth Circuit agreed with petitioner that such evidence was irrelevant, inadmissible and prejudicial. However, in refusing petitioner a new trial, the Eighth Circuit held that defendant's motion for directed verdict should have been granted because petitioner did not make a submissible case for the jury under the "consumer expectation test."

REASONS WHY THE WRIT SHOULD ISSUE

Under *Erie* and the Tenth Amendment, the Eighth Circuit Was Obligated to Follow Dicta in the Missouri Supreme Court Decision of *Nesselrode v. Executive Beechcraft, Inc.*, Rejecting the "Consumer Expectation" Test for Strict Products Liability

Petitioner fell off of a boat utilizing defendant's motors and suffered disabling leg injuries from being struck by defendant's propellers. He sued Brunswick in state court under § 402A strict liability in tort on the theory that the motors were unreasonably dangerous for lack of propeller guards. Defendant removed to federal court under diversity jurisdiction. The United States Court of Appeals for the Eighth Circuit found that Missouri follows the "consumer expectation test" in determining whether a product is unreasonably dangerous, and that, as a matter of law, motors with unguarded propellers are

not "unreasonably dangerous" under that test. Pree v. Brunswick, 983 F.2d 863, 867-868 (8th Cir. 1993); Appendix A xvi-xix.

In Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 376-78 (Mo. 1986) (En Banc), the case on which the trial judge relied for his ruling that Missouri did not follow the test, the Missouri Supreme Court discussed the pros and cons of the "consumer expectation test" at great length. Id. at 376-78. It noted that the "consumer expectation test has met with little enthusiasm among legal scholars," and that one criticism which has "been levelled" at the test is that "it fails when applied to open and obvious defects." Id. at 376, 376 n.6. Further, "dissatisfaction with the . . . consumer expectation formulation . . . has . . . taken hold in a number of jurisdictions," citing, "e.g.," California, New York, Oregon, Pennsylvania, New Jersey, and Texas. Id. at 376-77.

The Missouri Supreme Court went on to state: "[W]e have not yet formally incorporated, in any meaningful way, the . . . consumer expectation test into the lexicon of our products liability law." Id. at 377. "The . . . consumer contemplation test is a virtual stranger to Missouri's law of strict tort liability. . . . [W]e have been able to find only a handful of reported cases decided by our intermediate appellate courts which mention, but do not necessarily apply in any substantive fashion, the consumer contemplation test." Id. at 377 n.10.

The only post-Nesselrode Missouri opinion to mention the "consumer expectation test" recognized the above as a determination by the Missouri Supreme Court not to adopt such test: "In Nesselrode v. Executive Beechcraft, Inc., . . . the Supreme Court rejected the consumer expectation test . . . ." Richardson v. Holland, 741 S.W.2d 751, 753 (Mo. App. 1987).

In the trial of the instant lawsuit, the trial judge overruled Brunswick's motion for directed verdict, which was premised on the "consumer expectation test," ruling that "the State of Missouri has specifically disavowed" the "consumer expectations" test. Transcript V-6; Appendix C i-ii. The trial judge also rejected a proposed instruction on that test, specifically citing Nesselrode: "The Missouri Supreme Court in the Nesselrode case recognized that Missouri did not and has not adopted the consumer expectations test in product liability cases." Transcript VIII-11 to 12; Appendix C iii-iv.

The Eighth Circuit has declined to accept Nesselrode's rejection of the "consumer expectation test" because it is dicta:

> [W]hile we are cognizant of the Missouri Supreme Court's expression in Nesselrode of its dissatisfaction with the consumer expectation doctrine, we are less inclined than is Cowens to interpret the court's statements in this regard as an

> explicit decision to reject this concept altogether. The court in Nesselrode noted that the consumer expectation doctrine was a "virtual stranger to Missouri law of strict tort liability," but did not expressly overrule or reject prior Missouri cases which had mentioned this concept.

Cowens v. Siemens-Elema AB, 837 F.2d 817, 822 (8th Cir. 1988) (Emphasis added.).

In Linegar v. Armour of America, Inc., 909 F.2d 1150, 1153 (8th Cir. 1990), the Eighth Circuit continued to downgrade the dicta in Nesselrode: "Courts applying Missouri law also have applied what has become known as the 'consumer expectation' test for unreasonable dangerousness[1] . . . . But see Nesselrode,

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[1] This statement was not accurate. The only Missouri case cited was Aronson's Men's Store Inc., v. Potter Elec. Signal Co., 632 S.W.2d 472 (Mo. 1982) (En Banc). In that case, Aronson complained that a burglar alarm was "defective and unreasonably dangerous" because it was easily deactivated, leading to the loss of his property. The Supreme Court rejected this claim because "[n]either the control box, nor any other part of the system, exploded, ignited or caused harm to appellant's property in any manner, much less suddenly or violently." 632

707 S.W.2d at 377 . . . ."

In the instant case, the Eighth Circuit reduced its acknowledgement of the dicta in Nesselrode to the slightest of nods: "While we are aware that the Missouri Supreme Court has not adopted what is known as the 'consumer expectation' test into their lexicon in

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(Note 1 cont.)
S.W.2d at 474. Mr. Aronson's expectations played no part in the decision.

The Nesselrode court's discussion of its earlier opinion in Aronson's makes it quite clear that it was not a basis for a prediction by the Eighth Circuit that Missouri's highest court would have applied the consumer expectation test to the instant case:

> In Aronson's Men's Store v. Potter Electrical Signal Company, Inc., . . . this Court noted that the Restatement defined defectiveness by way of consumer expectations. We stopped short, however, of reaching the issue which would have required us to define the concept, and therefore we did not hold that under Missouri law the standard of defectiveness was rooted only in the expectation of the ordinary consumer.

Nesselrode, supra at 377-78 n.10 (Emphasis added.).

deciding product liabilities actions, it has not rejected it. See Cowens v. Siemens-Elema AB, 837 F.2d 817, 822 (8th Cir. 1988) (applying Missouri law)." Pree v. Brunswick, 983 F.2d at 867; Appendix A xvi. Though Nesselrode was not even mentioned by name, the language, the loc. cit. to Cowens' discussion of Nesselrode, and the trial court's reliance on Nesselrode make it quite clear that the Eighth Circuit panel below was keenly aware of the dicta in Nesselrode rejecting the consumer expectation test, and chose not to follow it.

Had this matter arisen in the Fifth, Sixth, Seventh, Tenth, or Eleventh Circuits, it is clear that the result would have been different. In the Fifth Circuit, in Fehlhaber v. Fehlhaber, 681 F.2d 1015, 1023 (5th Cir. 1982), the court held that it was "irrelevant," in deciding state substantive law in a diversity case, whether the language of a state's highest court was "dictum . . . for,

where we are bound by state law, considered dictum is to be followed as well as a precise holding."

The Sixth Circuit has accorded dicta by a state's highest court the same respect: "Appellants urge . . . that the foregoing ruling in Moyses was but dicta and was not essential to the issues litigated in that case. It is true that the immediate effect of the court's decision in Moyses was to uphold the discretion of the trial court . . . . The extensive recapitulation in Moyses is not a chance or offhand expression of the court, but is rather a clear and unequivocal conclusion of the highest tribunal in the state. We are convinced we should abide by it." Frank v. Voris, 503 F.2d 1023, 1024-1025 (6th Cir. 1974).

The Seventh Circuit also would have followed the dicta in Nesselrode: "The pronouncements in Central Indiana, while dicta

and not essential to the disposition of the case, nevertheless indicate the highest court of the state's interpretation of the law in this area, and we sitting as another court of that state, follow that interpretation as the substantive law of Indiana." Hartzler v. Chesapeake & Ohio Ry., 433 F.2d 104, 107 (7th Cir. 1970).

In the Tenth Circuit, the dicta in Nesselrode would also be followed: "It is clear that the statement was dictum. Nevertheless, '[t]he responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it.'. . . Both the holdings and considered dicta of the State Court should be applied." Hardy Salt Co. v. Southern Pacific Transp. Co., 501 F.2d 1156, 1163 (10th Cir. 1974).

The Eleventh Circuit also abides by dicta from a state's highest court in diversity

cases. In Towne Realty, Inc. v. Safeco Ins. Co., 854 F.2d 1264, 1268-69 (11th Cir. 1988), the Court held that a dictum in "[a] recent Florida Supreme Court case . . . resolve[d] the conflict" between two insurance policies. In a footnote, the Eleventh Circuit stated: "Insofar as this passage [in the Florida Supreme Court opinion] addresses escape clauses and yet the case apparently did not involve any escape clauses, the statement is a dictum. Even so, when considering a diversity case under state law, we are bound to decide the case the way it appears the state's highest court would, and we would be violating that duty to ignore the fact that this statement was made." Id. at 1269 n.5.

Although the United States Court of Appeals for the District of Columbia Circuit does not accord binding effect to dicta from the state's highest court, it is clear that the dicta from Nesselrode would have received a

more respectful reception from that circuit than it has in the Eighth Circuit: "[c]onsidered dictum. . . . is strongly persuasive, even though we may not be bound to accept it." Gasch v. Britton, 202 F.2d 356, 360 (D.C. Cir. 1953).

Those circuits which consider themselves bound by dicta from a state's highest court find strong support in (and, in some instances, have relied on) an opinion of this Court, involving a state's construction of its own statute, which predates Erie. In Hawks v. Hamill, 288 U.S. 52, 60 (1933), this Court said:

> In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissible, is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot.

In the remaining circuits, it appears that only the Ninth Circuit would treat the dicta in Nesselrode as cavalierly as the Eighth Circuit has treated it: "In cases where the appellate court of the state has not spoken, well-considered dicta should not be ignored." Gee v. Tenneco, 615 F.2d 857, 861 (9th Cir. 1980).[2]

That the language in Nesselrode was "considered dicta" as opposed to mere "obiter" is not open to question. The Missouri Supreme Court's wide-ranging review of its products liability law included reinforcement of its long-held view that:

> Under our model of strict liability the concept of unreasonable danger, which is determinative of whether a product is defective in a

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[2] From a reading of its opinion in McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 662-67 (3d Cir. 1980), it is unclear what treatment the Third Circuit would accord the dicta in Nesselrode. Counsel for petitioner has been unable to locate any discussions in the First or Fourth Circuits as to the effect of dicta from the highest court of a state in resolving Erie questions.

> design case, is presented to the jury as an ultimate issue without further definition. . . . Accordingly, our approved jury instruction which governs in a design defect case . . . does not contain as one of its component elements a definitional paragraph which gives independent content to the concept of unreasonable danger. . . . [A]t the trial of a design defect case, the concept of unreasonable danger is treated as an ultimate issue.

Nesselrode v. Executive Beechcraft, Inc., supra at 378.

Missouri submits the elements of a cause of action in a civil case to the jury in a "verdict-directing" instruction. The verdict director on products liability submits the issue of product defect as follows: "Second, the (describe product) was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use." MAI 25.04. This is the only instruction on this element which has ever been approved by the Missouri Supreme Court, and has been the law for over 20 years. Each pattern instruction in Missouri is deemed

to be both a "complete" and "correct statement of law." Missouri Approved Jury Instructions XV (Committee Report); Id. at XXXIII (Committee Comment). "Verdict directing MAIs hypothesize . . . . the ultimate facts which support the submitted claim . . . . The theory of claim is based on the applicable law." Id. at XXXIV (Committee Comment). The instructions have never submitted a "consumer's expectations" to the jury.

In rejecting the dicta in Nesselrode, the Eighth Circuit adopted a criteria for submissibility which is more restrictive, narrow, and particularized than the element which is submitted to the jury. This is a concept which is totally foreign to Missouri law. Since the adoption of MAI, there has never been a case in Missouri where a court has measured submissibility by a standard utilizing language other than that used in MAI.

The "considered dicta" in Nesselrode which the Eighth Circuit rejected is supported by other Missouri case law.[3] In Missouri, "[d]esign defects of a simple nature have

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[3] In preference to the dicta in the Supreme Court's decision in Nesselrode, the Eighth Circuit gleaned a "consumer expectation test" from dicta in two earlier intermediate appellate opinions. Pree v. Brunswick, supra at 867; Appendix A xvii. In the first of these, Cryts v. Ford Motor Co., 571 S.W.2d 683 (Mo. App. 1978), the court of appeals affirmed a verdict for plaintiff based on a claim of a defective armrest. The court held that evidence that the armrest "was constructed of hard plastic with minimal energy-absorbing capacity; that it was lightly padded; and that its point shape was such as to concentrate the force of energy absorbed by the body" supported a jury finding "that the armrest was defective and that it was unreasonably dangerous for its anticipated use." 571 S.W.2d at 688. The court did not analyze this evidence in light of the consumer's expectations.

In the other intermediate appellate opinion relied on by the Eighth Circuit, Racer v. Utterman, 629 S.W.2d 387 (Mo. App. 1981), Racer was burned when a disposable drape caught fire during an operation. In affirming a plaintiff's verdict, the court of appeals said: "We cannot say as a matter of law that this product is not 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it.'" 629 S.W.2d at 394. There was no attempt at analysis.

consistently been found to be submissible on the basis of an expert opinion that an alternative design was feasible." McDowell v. Kawasaki Motors Corp., 799 S.W.2d 854,866 (Mo. App. 1990); accord, Duke v. Gulf & Western Mfg. Co., 660 S.W.2d 404, 412 (Mo. App. 1983). There are also a legion of cases in Missouri upholding the submissibility of design defect cases without requiring the plaintiff to squeeze through the "consumer expectations" hoop.[4]

Since this Court does not appear to have spoken since Erie to the effect to be given dicta from a state's highest court, Petitioner

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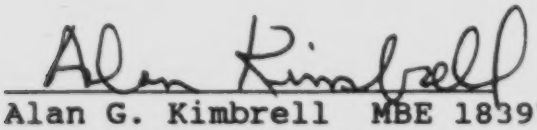
[4] E.g., Blevins v. Cushman Motors, 551 S.W.2d 602, 608 (Mo. 1977) (En Banc); Sanders v. Wallace, 817 S.W.2d 511, 514-15 (Mo. App. 1991); Asbridge v. General Motors Corp., 797 S.W.2d 775, 777-79 (Mo. App. 1990); McJunkins v. Windham Power Lifts, Inc., 767 S.W.2d 95, 100 (Mo. App. 1989); Klein v. General Electric Co., 714 S.W.2d 896, 900-901 (Mo. App. 1986); Commercial Distrib. Center Inc. v. St. Regis Paper Co., 689 S.W.2d 664, 669-70 (Mo. App. 1985); McClanahan v. Deere & Co., 648 S.W.2d 222, 223-24 (Mo. App. 1983).

respectfully submits that the conflict between the Eight Circuit's approach in the instant case and the rule in the majority of the other circuits should be resolved.

CONCLUSION

The writ should be granted because the Eighth Circuit, in determining the substantive law of Missouri in a diversity case, rejected considered dicta from that state's highest court, and based its determination upon dicta from earlier decisions in intermediate appellate courts.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-3402

James M. Pree,	*	
	*	
Appellant,	*	
	*	Appeal from the United
v.	*	States District Court
	*	for the Eastern
The Brunswick Corporation,	*	District of Missouri
	*	
Appellee.	*	

Submitted: September 16, 1992

Filed: January 7, 1993

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

McMILLIAN, Circuit Judge.

James M. Pree appeals from a final judgment entered in the United States District Court[1] for

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[1] The Honorable Frederick Buckles, Magistrate Judge, United States District Court for the Eastern District of Missouri. The parties consented, pursuant to 28 U.S.C. § 636(c) to allow the magistrate judge to conduct all proceedings, including entry of judgment.

the Eastern District of Missouri, following a jury verdict in favor of appellee, The Brunswick Corporation, in a product liability action alleging that a design defect in appellee's engines caused them to be unreasonably dangerous and that this defect resulted in enhanced injuries. For reversal, Pree argues that the district court erred in (1) admitting evidence of his drinking and intoxication before the accident and (2) instructing the jury on contributory fault. For the reasons discussed below, we affirm the judgment of the district court.

BACKGROUND

James Pree was injured on July 5, 1985, when he fell from the back of a 1985 Wellcraft Scarab II pleasure boat[2] owned by Todd Beckman. Pree and several friends had been spending the July

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[2]These sort of boats are also known as "planing" pleasure crafts, because as they increase in speed they rise partly out of the water and plane on the surface. See Elliot v. Brunswick Corp., 903 F.2d 1105, 1506 n.1 (11th Cir. 1990).

4th weekend at the Lake of the Ozarks drinking and partying. On the morning of July 5th, at about 1:15 or 1:30 a.m., Beckman attempted to dock the boat which was powered by twin Mercury Marine 330 horsepower motors. It was raining, the water was "choppy" and there was some lightning. As Beckman backed the boat into the slip, he asked Pree to "get the back of the boat." Pree was standing on the swim platform on the back of the boat. As Pree reached out to grab the dock pole, the boat suddenly moved forward and he fell off the boat into the water. Pree was severely injured by the unguarded, rotating propeller blades. He suffered compound fractures, cut tendons, and permanent muscle and nerve damage.

On October 3, 1989, Pree filed suit in the Circuit Court of the City of Saint Louis, Missouri, against appellee the parent company of Mercury Marine, the designer and manufacturer of the motors, including the drive mechanism which

required a propeller, and Genmar Industries, Inc., the successor corporation to Wellcraft Marine Corporation, the boat manufacturer and seller. Pree claimed that the propeller was defective and unreasonably dangerous because it was not equipped with a propeller guard. On October 25, 1989, appellee removed the action to the United States District Court for the Eastern District of Missouri. On January 30, 1991, Pree dismissed his claim against Genmar Industries, Inc.

On September 1991, the parties tried the case and the district court, over Pree's motion in limine and objection, admitted evidence that Pree had been drinking various alcoholic beverages all day and well into the night shortly before the accident. The district court also heard expert testimony from both sides on whether the twin engines were defectively designed. In addition, the district court gave the following contributory fault instructions to the jury:

> Your verdict must be for [appellee] if you believe: First, when plaintiff James Pree was standing on the swim platform at the rear of the boat, plaintiff knew of the danger of coming in contact with the propellers and appreciated the danger. And second, plaintiff James Pree voluntarily and unreasonably exposed himself to such danger. And third, such conduct directly caused or directly contributed to cause any damage plaintiff James Pree may have sustained.

The jury returned a general verdict in favor of appellee. No post-trial motions were filed. This appeal followed.

DISCUSSION

I.

For reversal Pree argues that the district court erred in admitting evidence of his drinking and in giving the contributory fault instruction. Appellee argues that the district court correctly admitted evidence of Pree's drinking and that the contributory fault instruction was a correct statement of applicable Missouri law. In addition, appellee argues that, even assuming

Pree's arguments are correct, the judgment in its favor should nonetheless be affirmed because Pree failed, as a matter of law, to prove that the propeller without guards was defective in a way not understood by the ordinary consumer. We affirm on the basis of the latter contention.

This product liability case comes to us on diversity jurisdiction and Missouri substantive law controls. Missouri has adopted section 402A of the Restatement (Second) of Torts. Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 364 (Mo. 1969) (Keener); McIntyre v. Everest & Jennings, Inc., 575 F.2d 155, 157 (8th Cir.) (Missouri law), cert.denied, 439 U.S. 864, 99 S. Ct. 187 (1978). Strict tort liability applies to product liability actions arising out of the way a product was designed. Blevins v. Cushman Motors, 551 S.W.2d 602, 607 (Mo. 1977). In order to recover under the theory of strict liability in tort for a defective design, Missouri law requires that a plaintiff prove the following

elements:

> (1) [the] defendant sold the product in the course of its business;
>
> (2) the product was then in a defective condition unreasonably dangerous when put into a reasonably anticipated use;
>
> (3) the product was used in a manner reasonably anticipated;
>
> (4) [the] plaintiff was damaged as a direct result of such defective condition as existed when the product was sold.

Linegar v. Armour of Am., Inc., 909 F.2d 1150, 1152 (8th Cir. 1990) (Linegar), citing Fahy v. Dresser Indus., 740 S.W.2d 635, 637-38 (Mo. 1987) (Fahy), cert. denied, 485 U.S. 1022 (1988). Because there are no real disputes as to the other three elements, we predicate our decision on the second element: whether the twin motors were in a defective condition unreasonably dangerous because they were designed without propeller guards. Whether a product is unreasonably dangerous is the determinative

factor in a design defect case. Hylton v. John Deere Co., 802 F.2d 1011, 1015 (8th Cir. 1986), citing Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 378 (Mo. 1986) (Nesselrode).

For purposes of imposing liability under Missouri's law of strict liability, a product's design is deemed defective when it is shown that the way that the product has been designed renders it unreasonably dangerous. Nesselrode, 707 S.W.2d at 377. Although Missouri courts have left the meaning of "unreasonably dangerous" to the common sense of the fact finder, Linegar, 909 F.2d at 1153, a product is defectively designed if it "creates an unreasonable risk of danger to the consumer or user when put in normal use." Id., citing Nesselrode, 707 S.W.2d at 375.

II.

Pree argues that the absence of propeller guards was a design defect which caused appellee's engines to be unreasonably dangerous and that the injuries from his fall were enhanced

by the defective propellers.[3] Pree further contends that he presented evidence, which showed that the alternative and safer propeller guard design proposed by him was technically feasible and practical in terms of cost and the overall operation of the twin motors.

In contrast, appellee argues that Pree's evidence was insufficient to prove that the engines were defectively designed because the propellers met the reasonable expectations of the ordinary consumer as to safety. They further

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[3]Although Missouri courts have recognized contributory fault as an affirmative defense to actions based on strict liability, see Keener v. Dayton Elec. Mfg., 445 S.W.2d 362, 365 (Mo. 1969); Jarrell v. Fort. Worth Steel & Mfg. Co., 666 S.W.2d 828, 833 (Mo. Ct. App. 1984), we have some concern over such instruction in a strict liability action brought for enhanced injuries. However, because our decision here turns on whether appellant showed that the twin engines were defectively designed, we see no need to address this issue and instead leave it for another case. Furthermore, we conclude that evidence of intoxication is irrelevant in a strict tort liability action for enhancement of injury. Moreover, it is not a determinative factor in this action.

argue that a safer practical alternative design was not available to appellee at the time it manufactured the twin motors. Hence, appellee argues that Pree failed to establish an essential element of his cause of action and his motion for a directed verdict should have been granted. We agree.

Unless a court can affirmatively say as a matter of law that the design renders a product "unreasonably dangerous," the question is generally one for the jury. Nesselrode, 707 S.W.2d at 378. However, the question is generally presented to the jury as an ultimate issue without further definition. Id. In determining whether a plaintiff has made a submissible case, we must examine the sufficiency of the evidence in the light most favorable to the plaintiff and view all inferences in his or her favor. Coulter v. Michelin Tire Corp., 622 S.W.2d 421, 426 (Mo. App. 1981).

Pree's evidence on the issue of whether the

unguarded propellers were unreasonably dangerous when put to a reasonably anticipated use took two forms: Pree's attorney designed and tested a propeller guard and demonstrated it to the jury; Pree presented the testimony of two experts, Benjamin Kelly and Robert Swint. Benjamin Kelly's opinion on whether appellee's unguarded propellers were unreasonably dangerous was the result of observing tests done on several propeller guards. From these observations, Kelly concluded that appellee had not carried out an adequate effort toward developing a design, device or modification or a propeller guard intended to minimize personal injuries from propellers.

Robert Swint's opinion on whether the unguarded propellers were unreasonably dangerous was predicated on several tests he conducted on two types of propeller guards, one of which was designed by Pree. From these tests, Swint determined that appellee's engines as

manufactured and sold without a propeller guarding device are defective. Pree presented no other evidence that appellees' twin engines were unreasonably dangerous.

Appellee also presented expert testimony. Richard Snyder testified that he conducted a variety of tests on propeller guard devices. From these tests he found that the devices increased the zone of danger, created conditions that could cause entrapment of human limbs, increased the likelihood of blunt trauma, and created unstable handling conditions. Snyder was of the opinion that the presence of propeller guards increased the likelihood and severity of injuries.

Don Kueny testified for appellee that he had the opportunity to evaluate and test various propeller devices. Kueny further testified that in 1985, when this accident occurred, a device did not exist that would provide people protection from propellers and that such device

does not exist even at the present time.

James Getz testified that as Chairman of the National Boating Safety Advisory Council's Propeller Guard Subcommittee he compiled data and evaluated various propeller guarding devices. Getz testified that after the Propeller Guard Subcommittee conducted hearings and testing, it concluded that it could not recommend a propeller guard because they presented problems with respect to entrapment, blunt trauma and hydrodynamic issues. He testified that the United States Coast Guard had adopted the finding and recommendations of the Propeller Guard Subcommittee not to require or recommend propeller guards. 46 U.S.C. § § 4302 & 13110 (1983).

Appellee also presented the testimony of two other experts, John Snider and James V. Benedict. Both experts were of the general opinion that there could be some protection by propeller guards, but only at very low speeds and barring

entrapment. They concluded that the higher the speed of the boat the greater the adverse effect of any type of propeller guard, including the substantial risk that the guard itself would produce blunt trauma and injury to the head, chest, neck and extremities.

Additionally, although Pree forcefully argues that appellee could have employed a safer alternative design for their propellers, there was no evidence that such a design existed at the time the propellers were manufactured. Moreover, while some conflict existed in the expert testimony, experts for both sides conceded that at this stage neither industry custom nor pertinent regulations dictate the use of propeller guards. Witnesses for both parties also acknowledge that no boat manufacturer, or boating accessory manufacturer currently offers a propeller guard for planing pleasure boats for the purpose of protecting persons from propeller contact. In fact, Robert Swint, Pree's expert

estimated that it would take more research and testing before an appropriate guard could be developed and marketed. He further concluded that the propeller guard proposed by Pree and his attorney repeatedly broke after short term testing.

Experts for both sides also testified regarding the potential difficulties that propeller guards might engender and concluded that they cause boats to lose power and speed due to added drag. They further determined that some customers would likely remove the guards to save fuel and regain power. The experts also found that the guard removal would cause the boat to exceed its power rating which in turn would create additional handling difficulties.

After viewing the record in the light most favorable to Pree, we conclude that the evidence was insufficient to show that appellee's engines were unreasonably dangerous, and the district court should have declared as a matter of law,

that the engines were not defective and directed a verdict for appellee.[4]

III.

While we are aware that the Missouri Supreme Court has not adopted what is known as the "consumer expectation" test into their lexicon in deciding product liabilities actions, it has not rejected it. See Cowens v. Siemens-Elema AB, 837 F.2d 817, 822 (8th Cir. 1988) (applying Missouri law). In fact, Missouri courts have concluded that "the plaintiff has the burden of proving that the product was unreasonably dangerous to the extent beyond that which would be contemplated by the user with ordinary knowledge common to the community as to its

---

[4]Although the parties have not raised this issue, "[w]e note that 'the standards for granting a directed verdict or judgment notwithstanding the verdict are the same under both federal and Missouri law.'" Sutherland v. Elpower Corp., 923 F.2d 1285 (8th Cir. 1991) (quoting SCNO Barge Lines, Inc. v. Anderson Clayton & Co., 745 F.2d 1188, 1192 n.5.(8th Cir. 1984)).

characteristics." Cryts v. Ford Motor Co., 571 S.W.2d 683, 688 (Mo. Ct. App. 1978) (citing Restatement (Second) of Torts § 402A, comment i); see Racer v. Utterman, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981); Aronson's Men's Stores, Inc. v. Potter Elec. Signal Co., 632 S.W.2d 472 (Mo. 1982); Linegar, 909 F.2d at 1152 (applying Missouri law).

The consumer expectation test focuses attention on the consumer rather than the manufacturer of the twin engines. Applying the same consumer expectation test in a factually similar case, the Eleventh Circuit determined, as a matter of law, that a pleasure boat's unguarded propellers were not dangerous beyond the expectations of the ordinary consumer. Elliot v. Brunswick Corp., 903 F.2d 1505, 1507 (11th Cir. 1990) (applying Alabama law which, like Missouri, adopted Restatement (Second) of Torts 402A) (Elliott), cert. denied, 111 S. Ct. 756 (1991).

In Elliott the plaintiff was injured by a

rotating propeller after jumping from a pier at night in the water next to an engine without a propeller guard. In reversing a jury verdict for the plaintiff, the court concluded that there are "certain products whose inherent danger is patent and obvious, [and that these products] do not, as a matter of law, involve defects of a sort that a jury should resolve." Id. at 1507; see also Linegar, 909 F.2d at 1153-54. The court reasoned that some products, by their nature, place both users and bystanders in some measure of danger. "A knife or an axe may cut persons, as well as their intended targets. Fishhooks can wound; saws can maim, and revolving propellers can cause fearful damage. Yet . . . we do not hold manufacturers liable simply because the use of their products involve some risks." Elliott, 903 F.2d at 1507.

The present case is factually similar to Elliott. The claimed design defect in appellee's engines is the same as the alleged defect

involved in the Elliott case: failure to provide a propeller guard. Therefore, we hold that the evidence presented in the instant case not only supported the jury's verdict, but the evidence was sufficient for the trial court to hold, as a matter of law, that the unguarded propellers were not unreasonably dangerous beyond the expectation of the ordinary consumer, including Pree.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-3402EMSL

James M. Pree,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for
The Brunswick Corporation,	*	Rehearing En Banc
	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

February 12, 1993

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

I certainly think it is a question that the Court needs to decide. I think it's a little premature. I think basically that's a question for the Court to decide when we come to instructing the jury and submitting the case, and I prefer putting off arguing that until that point.

As far as the motion for a directed verdict which, of course, as the Court knows we just saw it, we're also familiar with the Elliott case. I'd just like to point out one thing with regard to that. That case relied upon Alabama's consumer expectations law. As the Court knows --

THE COURT: Which the State of Missouri has specifically disavowed --

MR. KIMBRELL: That's right.

THE COURT: I'm fully aware of that.

MR. KIMBRELL: Nesselrode and --

THE COURT: All right.

MR. KIMBRELL: -- so on and so forth. That's all I was going to say, Judge.

THE COURT: Okay. All right. I agree with Mr. Kimbrell there. I think probably the issue of punitive damages is premature at this point. I think there is some evidence which might at this point, the Plaintiff could argue, could raise the possibility that punitive damages would be appropriate in this case, at least have been

reasons -- and it's an incorrect statement as the law -- and I don't think that the Court corrects that -- any per diem argument by the giving and reading of instruction #14. So we would -- first of all, we intend to object to the argument when it's made but, I mean, also I think that the giving and reading of instruction 14 is improper for those reasons.

Judge, I think that concludes all the objections that we have to the instructions, and thank you.

THE COURT: All right. Mr. Kimbrell, do you want to make any response to the arguments made by Mr. -- to the objections made by Mr. Mueller to the instructions that the Court's going to give, and any comment on the instructions offered by the Defendant which are going to be refused?

MR. Kimbrell: Very briefly, your Honor. The proposed instruction A tendered by the Defendant submits the consumer expectations

test. The Missouri Supreme Court has stated in Nesselrode v. Executive Beechcraft, Inc., 707 SW 2nd 371, at 376 to 78, 1986 case that the consumer expectations test is not the law of Missouri. Therefore, the Defendant's proposed instruction A is improper and our verdict directing instruction is proper under that case.

THE COURT: Okay. First of all, the Court has refused the Defendant's offered instruction A for the reasons just given by Mr. Kimbrell. The Missouri Supreme Court in the Nesselrode case recognized that Missouri did not and has not adopted the consumer expectations test in product liability cases. And that instruction, I believe, encompasses that standard, and therefore, I'm refusing to give the instruction.

The Defendant's offered instruction B relating to the withdrawal of Mr. Kelly's testimony is not being given for the reasons

(2)

SUPREME COURT, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

No. 92-1836

In The

Supreme Court of the United States

October Term, 1992

JAMES PREE,

Petitioner,

v.

THE BRUNSWICK CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit properly held that petitioner's action was barred by either of its alternative applications of Missouri product liability law.

2. Whether there is a conflict among the United States Circuit Courts of Appeals regarding the deference to be accorded considered dicta of a state's highest court in a diversity action.

PARTIES

The petitioner (plaintiff and appellant below) is James Pree.

The respondent (defendant and appellee below) is Brunswick Corporation. Brunswick has no parent corporations but has the following subsidiaries, excluding wholly-owned subsidiaries: Doellwood Financial, Inc.; Enhanced Energy Systems, Inc.; Intellitec International Inc.; Jewon, Co., Ltd.; Juangxi Marine Company, Limited; Merc Spader, Inc.; Nippon Brunswick Kabushiki Kaisha; Nireco Corporation; Sugita Seisakusho Co., Ltd.; Texas Lounge Operations, Inc.; Texas Thousand Oaks, Inc; Tohatsu Marine Corporation; and Wayne Recreation Center Lounge, Inc.

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No. 92-1836

In The

Supreme Court of the United States

October Term, 1992

JAMES PREE,

Petitioner,

v.

THE BRUNSWICK CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brunswick Corporation submits this brief in opposition to petitioner's request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Eighth Circuit entered judgment against petitioner on January 7, 1993. Pet. App. A; *Pree v. Brunswick Corp.*, 983 F.2d 863

(8th Cir. 1993). On February 12, 1993, the petition for rehearing was denied by unpublished order. Pet. App. B.

On September 25, 1991, the Honorable Frederick Buckles, Magistrate Judge, entered judgement in favor of respondent on a jury verdict in its favor.[1]

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment against petitioner on January 7, 1993. Pet. App. A. On February 12, 1993, the Eighth Circuit denied a timely petition for rehearing. Pet. App. B.

The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No federal constitutional or statutory provision is involved in this case.

STATEMENT OF THE CASE

Petitioner James Pree was injured at approximately midnight on July 5, 1985 when he fell into the water next

[1] The parties consented, pursuant to 28 U.S.C. § 636(c), to allow the magistrate judge to conduct all proceedings, including trial and entry of judgment.

to the rotating propeller of a boat that was being backed into a boat slip during a storm. The motor was designed and manufactured by a division of Respondent Brunswick Corporation. Boats of this sort are known as "planing" pleasure crafts, because as they increase in speed, they rise partly out of the water and plane on the surface. Pet. App. A at ii n.2; *Pree*, 983 F.2d at 864 n.2 (citing *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1506 n.1 (11th Cir. 1990), *cert. denied*, 111 U.S. 756 (1991)).

Petitioner claimed that respondent violated Missouri tort law by not including a so-called "propeller guard" in the motor's design. The "propeller guard" would consist of a structure that in some fashion would surround the propeller. Evidence at trial showed that, despite substantial efforts by respondent and others over many years to design such a device, no propeller guard suitable for use on planing pleasure craft had been developed, and that proposed guards are actually unsafe for use by the boating public.

Thus, witnesses for both sides testified that *no* boat manufacturer, boat motor manufacturer, or boating accessory manufacturer has ever been able to offer a propeller guard for planing pleasure boats for the purpose of protecting human beings from propeller contact. *See, e.g.*, R. IV 29-32, 62-63, 99, 107; V 114; VI 197. Use of such propeller guards is virtually unheard of anywhere in the world, except in a few special applications that are wholly unlike recreational planing boats.[2]

---

[2] Propeller guards are used in some parts of California, as well as in New Zealand and Australia, for life rescue operations

Indeed, Robert Swint, a systems engineer and one of petitioner's expert witnesses, acknowledged that a prototype he designed repeatedly broke after short term testing (R. IV 44-48, 56-59, 97-99), and estimated that it would take more research and testing (several generations of test products) to design, manufacture and market a safe and feasible propeller guard. R. IV 29-32, 62-63, 99, 107. He also acknowledged that every propeller guard currently proposed needed further technical development before it would be ready for use on planing pleasure craft. R. IV 84-90, 107.

Furthermore, the United States Coast Guard, which is charged with exclusive responsibility for establishment of boating safety regulations (*see* 46 U.S.C. § 4301 *et seq.*) has rejected any requirement for propeller guards on planing boats after extensively studying the question. R. VI 120-124. Moreover, propeller guards are not required by any state and are not required by the safety standards promulgated by responsible and authoritative boat safety organizations such as the American Boat and Yacht Counsel and the Society of Automotive Engineers.

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conducted in high surf; at one time they were also used on certain United States Marine Corps landing craft operated in high surf. R. V 70-75. It is expected that life rescue boats or military landing craft would be stationary or moving at very slow speeds, as contrasted with planing pleasure craft operated frequently at high speeds. It is also expected that, in both circumstances, floundering human beings would be in the water near the turning propeller. Propeller guards are used as well on small, slow-moving passenger boats in amusement parks. R. VI 124, Ex. I.

Finally, both parties' experts described numerous hydrodynamic, biomechanical and other dangers presented by propeller guards. These included:

- Substantial loss of power and speed due to added drag. R. IV 44-49, 89-91; V 67-74

- Safety hazards due to consumers' likely removal of guards to gain power and improve fuel economy thereby creating handling difficulties and causing the boat to exceed its power ratings. R. IV 99-100, 103; V 57, 67-68.

- Handling and steering problems because a guard would add new rudder area in entirely new planes creating additional steering torque. R. V 68-69.

- Dangers associated with guards breaking during use either directly or through sudden steering difficulties. R. VI 178.

- Increased danger of striking an individual in the water with the additional surface area created by the guard. R. V 57-58.

- Greater likelihood of severe injuries resulting from a "guard strike," which causes smashing and tearing injuries that are more difficult to repair than lacerations normally caused by a propeller strike. R. V 57, 67-68; VI 121, 203; VII 19, 25.

- Possible entrapment in the guard resulting in mutilation, amputation or drowning. R. V 57, 67-68; VI 121.

Despite the overwhelming evidence that safe propeller guards for planing pleasure craft simply did not exist when this motor was built (and do not exist today), the District Court allowed the case to go to the jury, which returned a verdict for respondent. The Eighth Circuit unanimously affirmed. Pet. App. A.

SUMMARY OF THE ARGUMENT

The petition for certiorari in this case should be denied because it flagrantly disregards the longstanding principle that "[t]he [certiorari] jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

Petitioner has not shown that any of the criteria for granting certiorari review have been met. Petitioner does not suggest that the Eighth Circuit committed any error of federal law. *See* S.Ct. R. 10. The decision below was a routine instance of a court of appeals exercising its diversity jurisdiction. The Eighth Circuit explicitly applied two separate principles of Missouri substantive law in concluding that "the evidence was insufficient to show that [respondent's] engines were unreasonably dangerous." Pet. App. A at xv, xix; *Pree*, 983 F.2d at 867, 868.

Petitioner attempts to disguise the routine aspect of this case by contorting the Eighth Circuit's decision in order to contrive a conflict between the Eighth Circuit opinion and the decisions of other United States Courts of Appeals. No such conflict, however, exists. Contrary to petitioner's assertions, the Eighth Circuit, when sitting in

diversity, has recognized the persuasive influence of considered dicta by state courts. In the instant case, the Eighth Circuit did not ignore considered dicta of the Missouri Supreme Court, but properly applied two separate and independent theories of Missouri product liability law to affirm the district court's entry of judgment for respondent.

ARGUMENT

I. PETITIONER DOES NOT CONTEND THAT THE COURT OF APPEALS COMMITTED ANY ERROR OF FEDERAL LAW.

Petitioner does not contend that the Court of Appeals committed any error of federal law, or "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S.Ct. R. 10.1.

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the dispositive questions in this case are entirely ones of state law. Petitioner does not contend that the Eighth Circuit failed to abide by its obligation under *Erie* to follow decisions of the Missouri courts. Pet. 7. Instead, petitioner asserts that in applying the "consumer expectation" test, the Eighth Circuit failed to follow dicta from a decision of the Missouri Supreme Court commenting that the "consumer expectation" test had not been incorporated "into the lexicon of [Missouri] products liability law." *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 376-78 (Mo. 1986).

As will be explained below, the Eighth Circuit properly applied state law to the facts of this case. In any

event, the petition should be denied since this Court does not sit to review questions of state law. *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 474 (1989). As has been noted, "a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983); *see generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.10 (6th ed. 1986).

II. THE EIGHTH CIRCUIT CORRECTLY DECIDED ISSUES OF MISSOURI STATE LAW.

The Eighth Circuit decision in *Pree* affirmed the District Court judgment for respondent based on two independent applications of Missouri product liability law: (1) that respondent's unguarded propellers were not unreasonably dangerous as a matter of law, and (2) that the danger posed by rotating propellers was not beyond the expectation of the ordinary consumer. Pet. App. A at xv-xvi, xix; *Pree*, 983 F.2d at 867, 868. Petitioner contends that the "consumer expectation" test has been "rejected" by dicta of the Missouri Supreme Court (Pet. 10), and therefore criticizes the Eighth Circuit's reliance on the "consumer expectation" test to support its decision. While respondent disputes this contention, petitioner raises no argument against the alternative ground for decision by the Eighth Circuit. On this basis alone, the Petition should be denied.

The Eighth Circuit opinion begins by setting forth four elements a plaintiff must prove under Missouri law in order to recover under a theory of strict liability in tort

for a defective design. Because there was no dispute as to the other three elements, the Eighth Circuit "predicat[ed its] decision on the second element: whether the twin motors were in a defective condition unreasonably dangerous because they were designed without propeller guards." Pet. App. A at vii; *Pree*, 983 F.2d at 865. For two separate and distinct reasons, the Eighth Circuit concluded that petitioner failed to establish this essential element of his cause of action.

First, the Eighth Circuit reviewed, in the light most favorable to petitioner, all of the evidence presented at trial on the issue of whether the unguarded propellers were unreasonably dangerous when put to a reasonably anticipated use. Pet. App. A at vii-xvi; *Pree*, 983 F.2d at 866-67 (Part II of the opinion). Although petitioner argued that a safer alternative design could have been employed, the Eighth Circuit noted that "there was no evidence that such a design existed at the time the propellers were manufactured." Pet. App. A at xiv; *Pree*, 983 F.2d at 867. "[B]oth sides conceded that at this stage neither industry custom nor pertinent regulations dictate the use of propeller guards," and "that no boat manufacturer, or boating accessory manufacturer currently offers a propeller guard for planing pleasure boats for the purpose of protecting persons from propeller contact." *Id.* Moreover, "[e]xperts for both sides testified regarding the potential difficulties that propeller guards might engender." Pet. App. A at xv; *Pree*, 983 F.2d at 867. Applying this uncontroverted evidence to the standard announced in settled Missouri precedent, the Eighth Circuit concluded that "the evidence was insufficient to

show that [respondent's] engines were unreasonably dangerous, and the district court should have declared as a matter of law, that the engines were not defective and directed a verdict for [respondent]." Pet. App. A at xv-xvi; *Pree*, 983 F.2d at 867.

The Petition omits any reference to the first of the independent bases for affirming the judgment of the District Court. Instead, the Petition addresses only Part III of the Eighth Circuit's opinion, which affirms the judgment of the District Court based on the "consumer expectation" test. As explained by the Eighth Circuit, this test is distinct from the test employed in Part II of the Eighth Circuit's opinion, because "[t]he consumer expectation test focuses attention on the consumer rather than the manufacturer of the twin engines." Pet. App. A at xvii; *Pree*, 983 F.2d at 868. Reviewing the evidence presented at trial, and a decision of the Eleventh Circuit in a factually similar case, the Eighth Circuit concluded that "the evidence presented in the instant case not only supported the jury's verdict, but the evidence was sufficient for the trial court to hold, as a matter of law, that the unguarded propellers were not unreasonably dangerous beyond the expectation of the ordinary consumer, including [petitioner]." *Id.* at 868 (citing *Elliott*, 903 F.2d 1505).

Petitioner's quarrel with the Eighth Circuit's reliance on the "consumer expectation" test (Part III) does not in any way belie the alternative ground for the Eighth Circuit's decision (Part II): that respondent's unguarded propellers were not unreasonably dangerous as a matter of law. Accordingly, even if one concedes all of petitioner's contentions, the Petition should not be granted since the

Eighth Circuit decision is independently supported without regard to the question sought to be raised by the Petition, and as a result it is unlikely this Court would need to reach the point of alleged importance or conflict. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.4 at 201, § 6.37 at 391 (6th ed. 1986).

III. THIS CASE DOES NOT PRESENT A CONFLICT AMONG THE CIRCUITS REGARDING THE BINDING FORCE OF CONSIDERED DICTA.

Petitioner does not contend that there is a direct conflict between the decision of the Eighth Circuit and a decision of the Missouri Supreme Court. The Petition rests entirely upon two premises: (1) that the Missouri Supreme Court has in dicta "rejected" the "consumer expectation" test as one means of determining whether a product is unreasonably dangerous; and (2) that the Eighth Circuit has refused to adhere to dicta by the Missouri Supreme Court in *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986) (en banc), critical of that test. Both premises are false.

A. The Missouri state courts have not rejected the "consumer expectation test."

Petitioner's brief repeatedly cites *Nesselrode* for the proposition that Missouri courts have "rejected" the consumer expectation test. Pet. 10. However, as the Missouri Court of Appeals commented after summarizing a similar

reading of *Nesselrode*: "the sweeping scope of this statement demonstrates the fallaciousness of the plaintiff's position." *Richardson v. Holland*, 741 S.W.2d 751, 753 (Mo. Ct. App. 1987).[3]

The Missouri Supreme Court in *Nesselrode* did not reject the consumer expectation test, in dicta or otherwise. The majority opinion, joined by only three judges, merely stated that the court "ha[d] not yet formally incorporated" the test "in any meaningful way." 707 S.W.2d at 377. The opinion then cited, without criticism, four Missouri appellate court decisions and one decision of its own "which mention[ed]" the consumer expectation test, only questioning whether in those instances the test had been applied "in any substantive fashion." *Id.* at 377 n.10. Discussing a decision in which the Missouri Supreme Court itself had invoked the test, the court clarified that "we did not hold that under Missouri law the standard of defectiveness was rooted *only in* the expectations of the ordinary consumer." *Nesselrode*, 707 S.W.2d at 377-78 n.10 (emphasis added) (citing *Aronson's Men's Stores v. Potter*

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[3] Petitioner miscites *Richardson* as "recogniz[ing] [*Nesselrode*] as a determination by the Missouri Supreme Court *not* to adopt [the consumer expectation test]." Pet. 9. In fact, the language Petitioner quotes from *Richardson* is the court's summary of the appellant's argument, an argument which the court of appeals then rejected. If anything, the opinion in *Richardson*, written one year after *Nesselrode*, supports respondent's position that *Nesselrode* cannot be read as rejecting the consumer expectation test. The *Richardson* court noted: "It is not necessary to determine *if* Nesselrode rejects the two tests [i.e. the consumer expectation and risk utility tests] for use by the court in determining if the characteristics of a product provide a basis for a submissible case." 741 S.W.2d at 753 (emphasis added).

Electric Signal Co., Inc., 632 S.W.2d 472, 473-4 (Mo. 1982) (en banc)). Notably, the Missouri Supreme Court refrained from criticizing, much less foreclosing, the use of either the consumer expectation test or the risk-utility test in the future. Finally, having raised the issue *sua sponte*, the Missouri Supreme Court in *Nesselrode* "cho[]se *not to decide* th[e] question" of which standards courts should or may use to determine when a product is defectively designed. *Id.* at 378 (emphasis added).

In short, the majority opinion in *Nesselrode* left the viability of the consumer expectation test – and for that matter any other test – completely unresolved. Indeed, this failure either to adopt or reject any of the available means of limiting or defining the concept of "unreasonably dangerous" was one of the "glaring deficiencies in the principal opinion" which prompted the vociferous dissent:

> [B]y not approving one of the tests, the principal opinion, in effect, leaves all future triers of strict product liability cases at their peril as to choosing a theory of proof at trial.

707 S.W.2d at 393 (Welliver, J., dissenting). Subsequent case law has borne out this prediction, and the lower courts in Missouri continue to grapple with the question of which of the available standards to apply. Nonetheless, the consumer expectation test has by no means been excluded from the menu of options: on at least two occasions since *Nesselrode*, the Missouri Court of Appeals has invoked the test with apparent approval, *see Lucas by Lucas v. R.G. McKelvey Building Co.*, 1992 WL 219182 (Mo. Ct. App. 1992); *Bhagvandoss v. Beiersdorf, Inc.*, 1986 WL 141628 (Mo. Ct. App. 1986), and in neither of these cases

did the Missouri Supreme Court feel compelled to overrule its application. *See Lucas by Lucas v. R.G. McKelvey Building Co.*, 847 S.W.2d 806 (Mo. 1993);[4] *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392 (Mo. 1987).

Under these circumstances, where at least seven Missouri cases have applied the consumer expectation test and none has explicitly foreclosed its use, the Eighth Circuit in *Pree* was entirely accurate in stating that Missouri courts "ha[ve] not rejected" the test. Pet. App. A at xvi; *Pree*, 983 F.2d at 867. More to the point, the Eighth Circuit did not err, much less intentionally ignore state court dicta, in invoking the consumer expectation test in this instance.[5]

B. The Eighth Circuit adheres to unambiguous state court dicta.

Petitioner asserts that "[h]ad this matter arisen in the Fifth, Sixth, Seventh, Tenth, or Eleventh Circuits, it is clear that the result would have been different." Pet. 13.

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[4] It should be noted that the Missouri Supreme Court's recent decision in *Lucas* postdates the Eighth Circuit's decisions in *Cowens v. Siemans-Elema AB*, 837 F.2d 817 (8th Cir. 1988), *Linegar v. Armour of America, Inc.*, 909 F.2d 1150 (8th Cir. 1990), and *Pree*. The state supreme court's silence in the face of the Eighth Circuit's continued application of the consumer expectation test would seem to contradict Petitioner's assertion that the state's high court had long since "rejected" the test in *Nesselrode*.

[5] Moreover, the Petition should be denied because this Court rarely reviews such state-law questions; "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than [this Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 57-58 (1979).

While the basis of this facile assertion is anything but clear, its premise – that these circuits feel themselves bound by state court dicta and that the Eighth Circuit does not – is clearly wrong.

Petitioner cites no Eighth Circuit opinion in which the court of appeals refused to follow unambiguous state court dicta. Indeed, the Eighth Circuit has long recognized that considered state court dicta are an invaluable indication "of what the state courts would probably hold." *Mutual Benefit Health & Accident Ass'n. v. Cohen*, 194 F.2d 232, 241 (8th Cir. 1952). *See also Standard Accident Ins. Co. v. Roberts*, 132 F.2d 794, 799 (8th Cir. 1942) (stating that clear, unequivocal dictum in an opinion of the state's highest court is persuasive as to what the state court would decide); *Goodson v. United States*, 151 F. Supp. 416 (D. Minn. 1957), *aff'd*, 253 F.2d 900 (8th Cir. 1958) (considered dicta are "entitled to great weight"). Accordingly, the Eighth Circuit has stated explicitly that considered dicta "should not be ignored when a federal court is attempting to construe or ascertain the meaning of the local law." *Brink's, Inc. v. Hoyt*, 179 F.2d 355, 358 (8th Cir. 1950).

Contrary to Petitioner's characterizations, the Eighth Circuit's opinions in *Linegar v. Armour of America, Inc.*, 909 F.2d 1150, 1152 (8th Cir. 1990), *Cowens v. Siemans-Elema AB*, 837 F.2d 817 (8th Cir. 1988), and this case do not depart from this tradition of respect towards considered state court dicta. The Eighth Circuit in *Cowens* recognized "the Missouri Supreme Court's expression in *Nesselrode* of its dissatisfaction" with the consumer expectation test, but correctly observed that the state supreme court had thereafter refrained – either in dicta or otherwise – from

explicitly rejecting the concept or expressly overruling prior Missouri cases which had invoked this concept. *Cowens*, 837 F.2d at 822.

Nor did the Eight Circuit in *Pree* make any statement indicating a refusal to follow unambiguous state court dicta. As it had done in *Cowens*, the Eighth Circuit noted the Missouri Supreme Court's cautionary words in *Nesselrode* (albeit citing them indirectly through *Cowens*), but correctly interpreted those words as leaving open the question of which test to apply when proving a product defect under Missouri law. Finding little guidance in *Nesselrode*, the Eighth Circuit in *Cowens*, *Linegar* and *Pree* ruled in accordance with prior decisions of the Missouri Court of Appeals and applied the consumer expectation test as *one* of the measures of defectiveness. *See Crytz v. Ford Motor Co.*, 571 S.W.2d 683, 688 (Mo. Ct. App. 1978); *Racer v. Utterman*, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981); *Aronson's*, 632 S.W.2d at 473-474. Thus, the ruling in this case does not derogate the value accorded by the Eighth Circuit – a value equal to that assigned by the other circuits – to unambiguous state court dicta. *See Standard Accident Insurance Co.*, 132 F.2d at 799 ("decisions of intermediate state courts are to be followed by federal courts as to state law 'unless [the federal court] is convinced by other persuasive data that the highest court of the state would decide otherwise.'") The "conflict" among the circuits with respect to the treatment of state court dicta is entirely fictitious.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be denied.

June 1993

Respectfully submitted,

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